TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

No. 257.

THE FIRST NATIONAL BANK OF TROY, APPELLANT,

vs.

MARVILLE W. COOPER, WALTER VAIL, WILLIAM B. S. GAY, AND CHARLES T. RANDALL, FORMERLY PARTNERS COMPOSING THE FIRM OF COOPER, VAIL & CO., AND SHEPARD TAPPIN, ASSIGNEE OF THE TROY WOOLEN COMPANY.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF NEW YORK.

FILED NOVEMBER 18, 1872.

SUPREME COURT OF THE UNITED STATES.

No. 257.

THE FIRST NATIONAL BANK OF TROY, APPELLANT,

vs.

MARVILLE W. COOPER, WALTER VAIL, WILLIAM B. S. GAY, AND CHARLES T. RANDALL, FORMERLY PARTNERS, COMPOSING THE FIRM OF COOPER, VAIL & CO., AND SHEPARD TAPPIN, ASSIGNEE OF THE TROY WOOLEN COMPANY.

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1 United States circuit court, northern district of New York.

THE FIRST NATIONAL BANK OF TROY
vs.
MARVILLE W. COOPER, WALTER VAIL, William B. S. Gay, & Charles T. Randall, formerly partners, composing the firm of Cooper, Vail & Co., and Shepard Tappen, assignee of The Troy Woolen Company.

The complainant herein filed its bill of complaint, which is hereto annexed, on the 27th day of November, 1871, against the defendants herein. A subpœna to appear and answer in said cause was
2 thereupon issued, returnable on the 1st day of January, 1872, and was served personally previous to the return day thereof, on the defendants.

The defendants Cooper, Vail, Gay & Randall duly appeared in said cause, by James S. Stearns, as their solicitor.

On the 20th day of January, 1872, the said defendants filed their demurrer to said bill of complaint, which said demurrer is hereto annexed.

Afterwards, and at the June term of said court held at the village of Canandaigua, on the 18th day of June, A. D. 1872—present, the Hon. Lewis B. Woodruff, judge—the said cause came on for argument
3 on demurrer to bill of complaint, and was argued by John Ganson, counsel for defendants, and by E. F. Bullard, solicitor for complainant.

And at the same term, to wit, on the 19th day of June, A. D. 1872, a decree was made and entered herein, sustaining the demurrer, and dismissing the bill of complaint with costs, which pleadings and proceedings appear by the papers hereto annexed, and forming a part of this enrolled decree.

4

5 United States circuit court, northern district of New York. In equity.

To the honorable the judges of the circuit court of the United States for the second circuit within and for the northern district of New York.

The First National Bank of Troy, a corporation duly organized under the laws of the United States, and having its location and place of business at Troy, in the county of Rensselaer, and within said northern district, brings this its bill of complaint, against Marville W. Cooper, Walter Vail, William B. S. Gay, and Charles T. Randall, formerly partners composing the firm of Cooper, Vail & Co., and also against Shepard Tappen, assignee of the Troy Woolen Company, as defendants herein.

And thereupon your orator complains and says that the Troy Woolen Company was duly organized in February, 1863, as a corporation for manufacturing purposes, under the laws of the State of New York, with a capital of $75,000, and its general place of business was at said city of Troy. That afterwards, and about February 8, 1865, the capital of said Troy Woolen Company was increased to the amount of $150,000.

That afterwards, and on the 4th day of February, 1870, upon the petition of certain of its creditors, the said Troy Woolen Company
6 was duly adjudged and declared a bankrupt by the district court of the United States for the northern district of New York; that afterwards, and on or about March 11, 1870, the said Shepard Tappen elected assignee of said bankrupt, and the matters pertaining to the affairs of said bankrupt were referred by said district court to H. J. King, esq., register in bankruptcy, residing at Troy aforesaid.

This complainant further states that, about March, 1870, said complainant proved a debt in its favor against said bankrupt, in due form of law, to the amount of $14,943.46, which was duly allowed by said register, and filed with said assignee, and this complainant is a creditor of said bankrupt to that amount.

This complainant further states that afterwards, and about July 23, 1870, the said Cooper, Vail & Co. made their deposition before one of the registers of this court, in the city of New York, whereby they formally proved a debt against said bankrupt amounting to $67,029.81 with interest; and on or about July 24, 1870, they filed said deposition as a proof of debt with said assignee.

That afterwards, and about November 29, 1870, this complainant, on due notice to said defendants, presented a petition to said district court, and thereupon an order was made on that day by said district court allowing this complainant and said assignee to contest the validity of the claim put in by said Cooper, Vail & Co. against said bankrupt, and it was thereby referred to Worthington Frothingham, esq., to take the proofs and accounts touching the said claim, and to hear and determine the legality and amount of said claim, and report his conclusions to that court.

And it was thereby further ordered that the said assignee, or any creditor of the bankrupt, if they desired to contest the said claim of Cooper, Vail & Co., attend for that purpose at the time and place appointed for proceedings under that order, and that the said assignee have notice of such proceedings.

7 This complainant further states that the matter was afterwards brought to trial and hearing before said referee, upon due notice to said assignee and to said Cooper, Vail & Co. That the complainant, with the majority of the creditors of said bankrupt, both before and during said hearing, requested the said assignee to contest said debt of Cooper, Vail & Co., and to employ counsel for that purpose. That the said Cooper, Vail & Co. did not then have any legal or valid debt or claim against said bankrupt, and the said assignee well knew that fact at the time he was requested to defend the same; but he then and there refused to contest said claim, or to employ counsel for that purpose, or to pay any of the expenses of such contest out of the trust fund.

This complainant further states that evidence was given before said referee to show that the said Cooper, Vail & Co. had no legal or valid claim against said bankrupt, yet the said referee reported that the whole of said claim was due to the said Cooper, Vail & Co.

That within due time thereafter joint exceptions to said report were filed, signed by the attorney of this complainant and by the attorney of said assignee; that said exceptions were afterwards argued before the said district court upon the evidence taken before said referee; and afterwards, and on or about July 10, 1871, the said district court made an order or decree allowing the said debt to said Cooper, Vail & Co., to the amount of $67,029.81, with interest from October 28, 1869, and said decree was filed with said district court, and entered July 13, 1871; and

by said decree it was further decreed that this complainant should pay the costs, referee's fees, and expenses of said Cooper, Vail & Co. in that matter, which will amount to over $600, as this complainant is informed and believes.

This complainant further states that, at the time said Troy Woolen Company was declared a bankrupt, the said Cooper, Vail & Co. did not have any legal or valid claim against said bankrupt, and have not
8 had since that time, and that they have fraudulently proved and made said claim, which facts were well known to said assignees at the time said exceptions were made to said referee's report, and at the time said decree was made by the district court, dated July 10, 1871, and said facts were duly proved before said district court.

This complainant further states upon information and belief, that the decree of the said district court allowing said debt in favor of Cooper, Vail & Co., is erroneous in the following, among other particulars:

First. That the said Cooper, Vail & Co. have no legal or valid debt or demand against said bankrupt, and never have had since said Woolen Company was adjudged a bankrupt.

Second. The evidence before said court clearly proved that said Cooper, Vail & Co. had no such debt or demand.

Third. The said district court erred in not rejecting and disallowing said debt.

This complainant further states that the assets in the hands of the assignee will not exceed $75,000, but are over $50,000; that legal debts against said bankrupt have been proved and allowed in the aggregate to an amount exceeding $150,000, and that said estate will not pay fifty cents on the dollar upon the legal debts, including the debt of this complainant, even if the said claim of said Cooper, Vail & Co. should be disallowed.

This complainant further states that on Saturday, the fifteenth day of July, 1871, and as soon as said decree was known to the complainant, it caused to be prepared the proper bond and notice of appeal, and on that day the same was submitted to said assignee or his attorney, with a request from this complainant that he appeal from the decree of the said district court to this court, but the assignee refused to do so.

That afterwards, and on or about July 18, 1871, the creditors of said bankrupt whose debts had been allowed, including this complain-
9 ant, requested said assignee to appeal to this from the said decree, and requested him to allow the said creditors to use his name for the purpose of such appeal, if he would not do it himself; and the said creditors then and there offered to protect and indemnify the said assignee against all costs which should be awarded against him on such appeal; that in answer to said request the said assignee stated and admitted, in substance, that he did not regard the said claim of Cooper, Vail & Co. as a legal debt or claim against the estate of said bankrupt to any amount, but that he was advised by his counsel that this complainant had a right to review said decree under section 2 of the act to establish a uniform system of bankruptcy throughout the United States, and that if the creditors desired to review the decision, they must take that course; that as assignee he should stand neutral between the parties, and would not appeal from the said decree of the district court, or allow his name to be used for that purpose.

This complainant further states that the said assignee did not appeal within the ten days allowed by law for that purpose, and never consented to allow the creditors to appeal in his name in time to make such appeal within the ten days allowed by law.

This complainant further states that it is advised and believes, and

therefore alleges, that said assignee was guilty of a neglect of duty in omitting to contest said debt, and in omitting to appeal from said decree of the district court allowing said debt of Cooper, Vail & Co., and it believes the said assignee intends to treat said claim of Cooper, Vail & Co. as legal, and pay a dividend upon the same, unless he shall be restrained by this court.

This complainant further states that it is informed and believes, and therefore avers. that said claim of Cooper, Vail & Co. is a valid debt against James S. Knowlson and Azro B. Morgan, of Troy, composing the firm of Knowlson & Morgan, and that the amount of such
10 debt is $67,029.81, with interest from October 28, 1869, and that the matters and items composing that debt are the same identical matters and items composing the said claim allowed against said bankrupt; but your orator avers that said bankrupt is not now, and never was. liable for said debt, or any part of it.

This complainant further states that the said Cooper, Vail & Co. intend to enforce the said decree of the district court for costs against said complainant, unless they shall be restrained by the order of this court.

In consideration whereof, and forasmuch as your orator can only have adequate relief in this honorable court, where matters and things of this kind are made cognizable by statute, and where this court has a general superintendence and jurisdiction of all cases and questions arising under the act of Congress to establish a uniform system of bankruptcy, approved March 2, 1867, and the acts amending the same. To the end, therefore, that the defendants may, if they can, show why your orator should not have the relief hereby prayed, and may, without oath, (which is hereby expressly waived,) and according to their best and utmost knowledge, remembrance, information, and belief, full, true, direct, and perfect answer make to the matters and things hereinbefore stated and charged;

And that the defendant may answer the premises, and that the order or decree of the said district court in said matter, dated July 10, 1871, may be reviewed, examined, revised, and annulled, and that the proof of debt filed with the assignee by said Cooper, Vail & Co. may be rejected and expunged, and the assignee directed not to pay the same, or any part thereof:

May it please your honors, the premises considered, to grant unto your orator a writ of injunction, issuing out of and under the seal of this honorable court, enjoining the said assignee from paying any dividend upon said claim of Cooper, Vail & Co., and enjoining the said Cooper, Vail & Co. from collecting from this complainant the costs and expenses awarded by said decree of the district court, dated July 10, 1871.

11 And that your orator may have such general relief, and such further or other relief as the nature of the case may require, and to your honors may seem meet.

May it please your honors, also, to grant unto your orator a writ of subpœna, directed to the said defendants, commanding them on a day certain therein to be named, to be and appear in this honorable court, then and there to answer the premises, and to stand to and abide such further order, direction, and decree as may be made against them, or either of them; and your orator as in duty bound will ever pray.

R. H. THURMAN,
Cashier First National Bank of Troy, N. Y.

E. F. BULLARD,
Solicitor for Complainant, Troy, N. Y.

NORTHERN DISTRICT OF NEW YORK,
Rensselaer County, ss:

Richardson H. Thurman, being duly sworn, says that he is the cashier of the complainant's bank above named, and he signed the foregoing bill of complaint, and that said bill is true of his own knowledge, except as to the matters stated upon information and belief, and as to those matters he believes it to be true.

R. H. THURMAN.

Sworn this 25th day of November, 1871, before me,
W. G. CRISSEY,
Notary Public, Troy, N. Y.

(Endorsed:) U. S. circuit court, northern district of New York. First National Bank of Troy, complainant, vs. Walter Vail & others. Bill. E. F. Bullard, sol. for compl't. Filed November 27, 1871.

12 In the circuit court of the United States for the northern district of New York. In equity.

THE FIRST NATIONAL BANK OF TROY
vs.
MARVELLE W. COOPER, WALTER VAIL, William B. S. Gay, Charles F. Randall, and Shepard Tappen, assignee of the Troy Woolen Company.

The demurrer of Marvelle W. Cooper, Walter Vail, William B. S. Gay, and Charles T. Randall, defendants, to the bill of complaint of the First National Bank of Troy.

These defendants, by protestation, not confessing or acknowledging all or any of the matters and things in the said complainant's bill contained to be true, in manner and form as the same are therein related, set forth, and alleged, do demur to the said bill, and for cause of demurrer show:

1st. That the said complainant hath not, by the bill aforesaid, made a case in equity whereon this court can ground any decree, or give the complainant any relief or assistance as against the defendants.

2d. That the matters and things related, set forth, alleged, complained of, and prayed for in the said bill of complaint, are not within the jurisdiction of this honorable court, nor cognizable by any municipal court of justice.

13 3d. That it appears by the complainant's said bill that there is no privity between the said complainant and the said defendants, to enable the said complainant to call on these defendants for the relief sought by the said bill.

4th. That the bill shows on its face that the matters therein complained of have been already adjudicated by the district court having cognizance thereof, and that such adjudication is conclusive upon the said complainants.

5th. That the bill shows upon its face that no appeal was claimed or taken from the order or decree of the district court, or notice thereof given, within the time prescribed by law.

6th. The said bill shows that the district court has decided the questions presented to this court by said bill, but the said bill does not set forth or disclose the facts, or the evidence upon which the order or de-

cree of the district court complained of, was made, or any facts or evidence before the court when said order was made, or the grounds upon which that court based its said decision and order or decree.

7th. That the said bill of complaint does not set forth facts sufficient to enable this court to determine whether or not the district court erred in making the order or decree in said bill complained of.

8th. That the said bill does not show that the district court erred in making the order or decree in said bill complained of, not does it show any equitable ground for the relief therein prayed for, or for any relief in the premises.

Wherefore, and for other good causes of demurrer appearing in the said bill, these defendants demur thereto, and they pray the judgment of this honorable court whether they shall be compelled to make any further and other answer to the said bill, and they humbly pray
14 to be hence dismissed, with their reasonable costs in this behalf sustained.

COOPER, VAIL & CO.
MARVELLE W. COOPER.
WALTER VAIL.
WILLIAM B. S. GAY.
C. T. RANDALL.

JAMES S. STEARNS,
Solicitor for the defendants, Marvelle W. Cooper, Walter Vail, William B. S. Gay, and Charles T. Randall.

JAMES S. STEARNS,
Of Counsel for the said Defendants.

The undersigned hereby certifies that, in his opinion, the foregoing demurrer is well founded in point of law.

JAMES S. STEARNS,
Of Counsel for said Defendants.

UNITED STATES OF AMERICA,
District of Massachusetts, County of Suffolk, City of Boston, ss:

On this 17th day of January, A. D. 1872, before me personally came William B. S. Gay and Charles T. Randall, two of the above-named defendants, who being severally duly sworn, make oath and say, each for himself, that the foregoing demurrer is not interposed for delay.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, this 17th day of January, A. D. 1872.

[SEAL.] GEO. T. ANGELL,
Notary Public in and for Suffolk County.

15 UNITED STATES OF AMERICA,
Southern District of New York,
City and County of New York, ss:

On this eighteenth day of January, A. D. 1872, before me personally
WM F. LETT. came Marvelle W. Cooper and Walter Vail, two of the
WM F. LETT. above-named defendants, who, being severally sworn, make oath and say, each for himself, that the foregoing demurrer is not interposed for delay.

In witness whereof I have hereto set my hand and affixed my notarial seal the eighteenth day of January, A. D. 1872.

[SEAL.] W'M F. LETT,
Notary Public for New York County,
335 *Broadway.*

(Endorsed:) U. S. circuit court, northern district of New York. The First National Bank of Troy vs. Marville W. Cooper et als. Demurrer. James S. Stearns, solicitor for def'ts, Marville W. Cooper et als., 74 Broadway, New York. Filed January 20, 1872.

16

17 At a stated term of the circuit court of the United States of America for the northern district of New York, in the second circuit, held at the village of Canandaigua, on Wednesday, the 19th day of June, in the year of our Lord one thousand eight hundred and seventy-two.

Present, the honorable Lewis B. Woodruff, judge.

THE FIRST NATIONAL BANK OF TROY
vs.
WALTER VAIL & OTHERS.

This cause having come on for a hearing at the present term of this court upon demurrer to bill of complaint, and having been argued by counsel for the respective parties, and the court, having con-
18 sidered the same, ordered that the demurrer be, and the same is hereby, sustained, and the bill of complaint dismissed, with costs.

L. B. WOODRUFF,
Circuit Judge.

19 Wherefore the costs of the defendants are taxed at forty-two dollars and thirty-nine cents.

Whereupon the said pleadings, decree, and other papers required are now attached together, and hereto annexed, and the said decree is signed and enrolled according to law.

Judgment signed, and decree enrolled this 17th day of August, A. D. 1872.

CHARLES MASON, *Clerk.*

20 (Indorsed:) U. S. circuit court, north. dist. of N. Y. In equity. The First National Bank of Troy vs. Walter Vail & others. Enrolled decree for defendants' costs. James S. Stearns, def'ts' sol. Taxed costs, $42.39. (Orig.) Filed August 17, 1872, 3 o'clock p. m.

21 Circuit court of the U. S., northern district of New York.

THE FIRST NATIONAL BANK OF TROY
vs.
WALTER VAIL, MARVILLE W. COOPER, William B. S. Gay, & Charles T. Randall, & Shepard Tappen, assignee of the Troy Woolen Company.

To the honorable the Supreme Court of the United States:

The appeal of The First National Bank of Troy, the above-named complainant & appellant, respectfully showeth—

That, on the 27th day of November, 1871, the above-named complainant filed its bill in the circuit court of the U. S. for the northern district of New York against the above-named defendants for the purpusose of vacating & annulling a debt proved by said other defendants against

said Tappen, assignee in bankruptcy of the Troy Wollen Co. That it was alleged in and by said bill, among other things, that said
22 Cooper, Vail, Randall, & Gay were partners under the firm-name of Cooper, Vail & Co., that, as such, they had proved a debt against the Troy Woolen Company, a bankrupt, for 67,029.81.

That the said Tappen, as such assignee, knew the said Cooper, Vail & Co. had no such debt, yet he refused to contest the same or appeal from the order of the district court of the U. S. for the northern district of New York allowing said debt.

That the complainant is a creditor of said bankrupt to the amount of $14,943.46.

That the contents of said bill will more fully appear by reference to the same, a copy of which is herewith submitted, and made a part of this petition.

That afterwards the said Cooper, Vail & Co. appeared in said action, & filed a demurrer to said bill.

That, on the 19th day of June, 1872, a final decree was made by said circuit court, then in session, at Canandaigua, that said demurrer be sustained; and that the bill of complaint herein be dismissed. That afterwards and on the 3d day of August, 1872, the costs of said defendants were taxed at $42.39, and a final decree entered, & enrolled
23 against the complainant for that amount, as your petitioner is informed and believes.

Wherefore this appellant appeals from the whole of said decree of the said circuit court, and prays that the decree of said circuit court and the bill, demurrer, & proceedings in the said cause may be sent to the Supreme Court of the United States without delay, and that the said Supreme Court will proceed to hear the said cause anew, and that the said decree of the circuit court and every part thereof may be reversed, and a decree made overruling said demurrer with costs, or such other decree as to the Supreme Court shall seem just.

Dated August 17, 1872.

FIRST NATIONAL BANK OF TROY, N. Y.,
By R. H. THURMAN, *Cashier.*

E. F. BULLARD,
Sol. & of Counsel for Appellant.

NORTHERN DISTRICT OF NEW YORK,
Rensselaer County, ss :

Richardson H. Thurman, being duly sworn, says that he is the cashier of the bank named as petitioner as above, and that he signed said
24 petition, knows the contents thereof, & believes the same to be true.

R. H. THURMAN.

Sworn this 17 day of August, 1872, before me.
[L. S.] JOHN F. CALDER,
Notary Public.

(Endorsed:) U. S. circuit court, northern D. of New York. The First National Bank of Troy vs. Walter Vail & others. Petition for appeal. E. F. Bullard, sol.

I allow an appeal in this action to the Supreme Court of the U. S. Dated August 19, 1872.

S. NELSON.

Orig. filed August 22, 1872.

25 Know all men by these presents that we, The First National Bank of Troy, & Richardson H. Thurman, of the city of Troy, New York, are held and firmly bound until Marville W. Cooper, Walter Vail, William B. S. Gay, Charles T. Randall, & Shepard Tappen, in the full and just sum of five hundred dollars, to be paid to the said Cooper, Vail, Gay, Randall, & Tappen, their certain attorneys, administrators & assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators jointly & severally by these presents, sealed with our seals, and dated this 17 day of August, in the year of our Lord one thousand eight hundred & seventy-two.

Whereas lately at a circuit court of the United States held at Canandaigua in & for the northern district of New York, in a suit depending in said court between The First National Bank of Troy, complainant, and said Cooper, Vail, Gay, Randall, & Tappen, defendants, a final decree was rendered against the said bank dismissing the
26 complaint as to Cooper, Vail, Gay, & Randall, with $42.39 costs; and the said bank having taken an appeal to the Supreme Court of the United States to reverse the said decree, rendered in the above-entitled action by the said circuit court, and a citation directed to the said Cooper, Vail, Gay, & Randall, citing and admonishing them to be and appear at a Supreme Court of the United States to be holden at Washington, the first Monday December next, being now prayed for:

Now the condition of this above obligation is such that if the said bank shall prosecute its appeal to affect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force & virtue.

{ FIRST NATIONAL SEAL BANK, TROY, N. Y. } FIRST NATIONAL BANK OF TROY, N. Y.,
By R. H. THURMAN, *Cash.*
R. H. THURMAN. [L. S.]

Sealed & delivered in presence of—
W'M H. HOLLISTER, JR.

STATE OF NEW YORK,
27 *Northern District of New York,*
Rensselaer County, ss:

On this 17th day of August, 1872, before me personally appeared Richardson H. Thurman, to me personally known to be the same person described in and who executed the above bond, and being by me duly sworn, deposed & said that he is worth at least ten thousand dollars over and above all debts & liabilities, & that he is a freeholder of said county, and that he is cashier of said bank, & signed said bond in the name of said bank, & that the corporate seal of said bank is affixed to said bond, & the same was done by said Thurman as said cashier, & thereupon the said Thurman individually, & also as such cashier, acknowledged the execution of said bond.

W'M H. HOLLISTER, JR.,
Notary Public, Troy, N. Y.

28 (Indorsed:) Supreme Court of the United States. The First National Bank of Troy ag't Walter Vail & others. Bond.

Approved by me, August 19, 1872.

S. NELSON.

Orig. filed August 22, 1872.

REC. 257—2

29 The United States of America to Marville W. Cooper, Walter Vail, William B. S. Gay, & Charles T. Randall, greeting:

You are hereby cited and admonished to be & appear at a Supreme Court of the United States to be holden at Washington on the first Monday of December next, pursuant to an appeal filed in the clerk's office of the circuit court of the United States for the northern district of New York, wherein the First National Bank of Troy is complainant, and you are respondent and defendants, to show cause, if any there be, why the decree rendered against the said complainant as in the said appeal mentioned, should not be corrected, & why speedy justice should not be done to the parties in that behalf.

Witness the Hon. Samuel Nelson, associate justice of the Supreme Court of the United States, this 19th day of August, in the year of our Lord one thousand eight hundred & seventy-two.

S. NELSON.

30 NORTHERN DIST. OF N. Y., *Rensselaer County, ss:*

Edward F. Bullard, being duly sworn, says that on the 22d day of August, in the city of New York, he served a copy of the foregoing citation on Marville W. Cooper, one of the defendants named therein, by leaving the same with him; and at the same time showing the original; and deponent also, on said day & in said city, served a copy of the said citation on James S. Stearns, the solicitor for said Cooper, by leaving the same at his office between the hours of 12 & 2 o'cl'k p. m., with his clerk, during the absence of said Stearns therefrom, & at the same time showing the original.

E. F. BULLARD.

Sworn to before me August 23, 1872.

W'M H. HOLLISTER, J'R,
Notary Public, Troy, N. Y.

(Indorsed:) Supreme Court of the United States. The First National Bank of Troy ag't Walter Vail & o's. Citation. E. F. Bullard, sol. for comp'l't, Troy, N. Y. Filed August 26, 1872.

31 UNITED STATES OF AMERICA,
Northern District of New York, ss:

I, Charles Mason, clerk of the circuit court of the United States of America for the northern district of New York, do hereby certify that I have compared the writings annexed to this certificate, and they are true copies of their respective originals, and are correct transcripts therefrom, now on file and remaining of record in my office, being a full and complete copy of the record and proceedings in the cause entitled The First National Bank of Troy vs. Marville W. Cooper, Walter Vail, William B. S. Gay, and Charles T. Randall, formerly partners composing the firm of Cooper, Vail & Co., and Shepard Tappin, assignee of the Troy Woolen Company.

In testimony whereof I have hereunto set my hand and duly affixed the seal of the said court, at the city of Utica, in said district, this 12th day of November, A. D. 1872, and of the Independence of the said United States the ninety-seventh.

[SEAL.] CHARLES MASON, *Clerk.*

(Indorsement on cover:) No. 257. The 1st National Bank of Troy, appellant, vs. Marville W. Cooper, Walter Vail, W'm B. S. Gay, & Charles T. Randall. N. New York C. C. U. S. Filed 18th November, 1872.

SUPREME COURT

OF THE UNITED STATES,

No. 257.

THE FIRST NATIONAL BANK OF TROY, *Appellant,*

against

MARVILLE W. COOPER, WALTER VAIL and OTHERS, and ASSIGNEE OF THE TROY WOOLEN COMPANY. *Respondents.*

APPELLANT'S POINTS.

This is an appeal from the Circuit Court of the United States, for the Northern District of New York, where a decree was made dismissing the complaint for want of jurisdiction. Page 7, Fol. 17.

The bill was filed to expunge a debt of $67,000, claimed by Cooper, Vail & Co. against the Troy Woolen Co., and to annul the order of the District Court refusing to reject, but allowing said debt.

The assignee, although requested by the creditors, refused to contest the debt, and refused to appeal from the order of the District Court, under section 8, although he knew the said Cooper & Co. had no claim. Page 3.

The defendants, Cooper & Co., demur, and claim that the Circuit Court has no jurisdiction. Page 5.

The bill was filed with a double aspect—

1st. As an original bill:

2d. To review under section 2.

POINT I.

The Circuit Court has full *original* jurisdiction under sub. 3 of sec. 2, Bankrupt Law.

(*a*) The order of District Court allowing the debt gives Cooper & Co. an adverse interest touching the property of the bankrupt.

It is an apparent lien upon the estate.

(*b*) This suit is, in effect, the same as if brought by the assignee. He should be plaintiff, but as he neglects his duty he is made a defendant.

Morgan v. Thornhill, 11 Wallace, 65 is not inconsistent with this view.

(*c*) The assignee, having refused to perform his duty, gives the creditor the right to bring the action.

Bate v. Graham, 11 N. Y., 237.
Hagan v. Walker, 14 How., 29 U. S.

POINT II.

The Circuit Court being a court of equity, with *general jurisdiction*, it has power to set aside said debt and also the order of the District Court, without invoking the special jurisdiction under section 2 of Bankrupt Law.

Dobson v. Pearse, 12 N. Y., 156.
See cases cited, page 162 to 164.
In Re. Richardson, 2 N. B. Register, 74.
Approved, Jobbins v. Montague, 6, " 517.

(*a*) As Cooper & Co. admit, by the demurrer, that they have no legal claim, and that they fraudulently presented it, and by neglect of assignee were allowed to obtain the judgment or decree, it should be set aside.

"Any fact which clearly proves it to be against conscience to execute a judgment, and of which the injured party could not avail himself at law, but was prevented by fraud or accident, unmixed with any fault or negligence in himself or his agent, will justify an interference by a court of equity."

Allen, J., 12 N. Y., 165.

(*b*) In the case at bar that rule has more force, where this plaintiff could not defend his own rights until the assignee was guilty of the negligence.

Point III.

"The Court of Chancery has inherent jurisdiction in matters of trust and confidence."

Tiffany & B., on Trusts, 377.

(*a*) Equity will interpose to prevent a failure of justice, and compel a performance of a trust.

2 Story Eq. Jur., sec. 961.

(*b*) Courts of equity have power to remove a trustee independent of any statute.

People v. Norton, 9 N. Y., 178.
Leggett v. Hunter, 19 N. Y., 445.

(*c*) "Circuit Courts have same power to grant relief under State laws as under those of the United States when the proper parties are before them."

Boyce, 30—citing 6 McLean, 395.

Point IV.

Circuit Courts have *general jurisdiction in equity* under the Constitution, independent of any statute.

Art. 3, sec. 2, provides that the *judicial power* shall extend to all cases in *law and equity* under the Constitution and Laws of the United States, &c.

In bankrupt cases the Supreme Court has *appellate* jurisdiction under same section.

Sec. 1 provides that "the *judicial power* shall be vested in one Supreme Court, and in such inferior courts as Congress may establish."

As Congress has established but two inferior courts (Circuit and District) one or both of them must be vested with this power in law and equity under section 2 of the Constitution, otherwise no court is provided in which it does exist, as the Supreme Court can only have *appellate* jurisdiction.

We submit that the moment Congress established the Circuit Court that moment jurisdiction became vested in it by force of the Constitution.

As soon as the first Congress was elected its powers were vested, and it could not, by any statute or act of its own, divest itself of the powers vested in it by force of the Constitution.

Neither can this court refuse to exercise the powers thus conferred by the Constitution, which "*extends to all cases in law and equity.*"

Bump, 239 and 240

The Bankrupt Court is a special creature of the statute.

Clark v. Binninger, 3 B. R., 129.

It is a special court as much as the surrogate's court under the laws of New York.

Congress could give all *special* authority to the District, or any new Court, in bankruptcy.

But Congress could not take away from the Circuit Court its general jurisdiction, which "extends to all cases in law and equity," by force of the Constitution.

If any proceeding takes place in the Bankrupt Court, which is against equity and conscience, the court with equity power will intervene and see right done.

The assumption, in some of the cases, that the jurisdiction of the Circuit Court depends wholly upon what is given by statute, would, therefore, seem to be erroneous.

Those cases were decided when slavery was the controlling power in the government.

During the last ten years the courts, as well as the legislative department of the government, have been asserting the proper authority vested by the Federal Constitution.

So far as *law and equity* are concerned the Constitution gives the power, the moment the inferior court is organized, to receive it.

If that is not the proper construction then there is no court organized by Congress with general powers at law and in equity.

Section 1 of the bankrupt act only gives a special and statutory jurisdiction to the District Court, and does not purport to give general jurisdiction in law or equity.

Of course these views do not interfere with the power of Congress to regulate the practice and proceedings in equity or law cases, or the form of process, &c.

The language of the State Constitution of 1846

gives general jurisdiction in law and equity—Art. 3, Sec. 3.

McCartney v. Bostwick, 32 N. Y., 53 and 57.
Willard's Eq., 347.
Erie Railway Co. v. Ramsey, 45 N. Y., 647 to 651.

"It would be too much to say that in no case can a court restrain the suitors in another court of co-ordinate powers."

Id., 647.

SECOND ASPECT OF BILL.

Point V.

This court has full jurisdiction, under sub. 1 of sec. 2 of the bankrupt law, to review and correct the error of the District Court.

(*a*) Because such power is expressly given by that section.

Sweatt v. R. R. Co., 5 B. R., 234.
In Re. Alexander, 3 B. R., 6.

(*b*) Because no appeal was taken under Sec. 8 by the negligence or fraud of the assignee.

Bate v. Graham, 11 N. Y., 237.
Hagan v. Walker, 14 Howard, 29.

In that case the administrator was guilty of two years' delay.

(*c*) The assignee is deemed to intend the consequences of his own acts.

Van Pelt v. McGraw, 4 N. Y., 110, 114.

The direct effect of his conduct is to defraud the plaintiff.

(*d*) The decision upon the *petition* for review, heretofore filed, does not bear upon this bill.

That asked for simply a review upon the same facts which were before the District Court. This bill alleges outside facts, and shows the fraud and collusion between the defendants, which facts could not be brought before the court below.

"Thus, one court of equity has overhauled the decree of another court of equity for fraud, contrivance or *covin* in the obtaining of it."

Erie R. R. Co. v. Ramsey, 45 N. Y., 648.
Bandon v. Beecher, 3 Clark & Fin., 479.

(*e*) The decision of the Circuit under section 24, upon the merits of the defendants' claim, would be *final*.

Morgan v. Thornhill, 5 B. R., 6.

(*f*) The decision of the District Court does not import *absolute verity* because an appeal is allowed.

It is only *presumed* to be right. That presumption is overthrown in this case, because error is averred and admitted.

(*g*) The plaintiff has no other remedy by reason of the wilful negligence or fraud of the assignee. Equity, therefore, properly intervenes to prevent a failure of justice.

"Where a party has a good defence to an action at law, which, by mistake, accident or fraud, he is prevented from making, equity will interpose and make the defence available, and the remedy effectual by injunction."

45 N. Y., 617.
Willard's Eq., 347.
Marine Ins. Co. v. Hodgeson, 7 Cranch, 332.

> It is true that the last clause of section 22, gives the court authority to examine the bankrupt and other witnesses concerning the proof of debt, on the application of the assignee or of any creditor, and requires the court "to reject claims founded in fraud, illegality or mistake."

This proceeding is entirely summary, and there is no mode of procuring a common law trial, or of tendering a bill of exceptions, and if the court neglects to reject the debt, then no remedy is given to the contesting creditor where the assignee is in collusion with the claimant and refuses to appeal.

No remedy is "*otherwise provided*" for the honest creditors, except by a review under section 2, unless the Circuit Court has original jurisdiction as before claimed.

It is clear, therefore, that the Circuit Court has power to review said decision of the District Court under this bill, and erred in failing to do so.

We submit that such position is settled, in substance, by the following authorities:

> Morgan v. Thornhill, 11 Wallace, 65.
> Marshall v. Knox, 16 Wallace, 551.
> Insurance Co. v. Comstock, 16 Wallace, 258.

The fact that the decision of the Circuit Court, under section 24 would be final, shows the necessity that such court should hear the case upon its merits.

Within ten days after the decree of the District Court was made, this complainant as the contesting creditor filed with the clerk of *that* court a petition asking for a review under sub. 1, of section 2, but at the October term, 1871, of the Circuit Court, held at Albany, Judge Woodruff dismissed that petition

for want of jurisdiction, holding that the order of the District Court was final. Upon that petition we expected to argue the case upon the evidence taken in the District Court, in the nature of an appeal.

This complainant thereupon filed a second petition in the office of the Clerk of the Circuit Court, and served a copy thereof upon Cooper, Vail & Co. asking to review that decision under section 2; that petition containing substantially the same facts as are in the present bill, and also the further allegation, added at page 3, fol. 9, that the assignee gave as a reason for refusing to appeal, that the district judge advised him and his counsel not to appeal, because the creditors had a right to procure a review under section 2 as stated at said fol. 9.

The said Cooper & Co. at the January term, 1872, of said circuit, moved to dismiss said petition for want of jurisdiction, and the same was granted by the court.

The two last proceedings are merely cited as authorities, and will appear in the records although not yet reported.

Conceding the Circuit Court did not have *original* jurisdiction, but did have jurisdiction to review under sub. 1 of section 2, then this court has the right to issue a mandamus against the Circuit Court to direct it to proceed and hear the case upon its merits.

16 Wallace, 258, 270.

POINT VI.

We submit also, that this court has the right on this appeal to reverse the decree below and remit the case, to be tried upon its merits.

In Morgan v. Thornhill, the Circuit Court did hear and decide the case upon the merits, and therefore, no error was committed, and hence this court could not reverse.

That review was also upon *petition*, and not by *Bill*, as in the case at bar.

Mead v. Thompson, 15, Wallace, 635.
Insurance Co. v. Comstock, 16 Wallace, 258, were of the same character.

What was said by the court in those three cases, would not apply to the case at bar, because it is a regular suit.

In Marshall v. Knox, 16 Wallace, at page 555, Mr. Justice Bradley says:

> "But regarded as a Bill of review, we could not, according to our own decision in Morgan v. Thornhill, entertain an appeal from the decision of the Circuit Court, in the case."

As the Court did reverse the decree in that case upon the other ground, we submit that the above remark is *obiter*.

And we further submit that the three decisions before cited, are distinguishable from this case, and therefore do not determine that this appeal will not lie.

This is a regular suit, and therefore an appeal does lie under Section 9 of the Bankrupt act, and also under the Judiciary act.

The fact that the Circuit Court did not pass upon the *merits* of the case, is a reason why this court cannot make a *final* decree, but it is no reason why the erroneous decree below should not be reversed.

The defendants are not allowed to say that they

have procured an erroneous decree, as a reason to prevent its reversal.

The People v. N. Y. C. R. R. Co., 29 N. Y., 418.

In that case, if the General of the Supreme Court had heard the appeal and decided it upon the merits, that decision would be final, but having dismissed the appeal for want of jurisdiction, the Court of Appeals reversed the latter decision to set the court below in motion.

That appeal was under Section 11 of the New York Code and is as follows: "The Court of Appeals shall have exclusive jurisdiction to review every *actual* determination hereafter made at a General Term of the Supreme Court" in certain specified cases.

Dismissing the appeal was held to be an actual determination.

Green v. Creighton, 23 How., W. S. 99, is directly in point.

POINT VII.

Error lies on a judgment of non-suit.

Bax v. Bennett, 1 H. Black, 432.
4 Term Rep., 436.
Schermerhorn v. Jenkins, Johnson, 373.
Lovell v. Evertson, 11 Johnson, 32.

The same principle should apply to appeals.

We submit that the decree of the Circuit should be reversed with costs and the proceedings remitted to that court to hear the case on the merits.

E. F. BULLARD,
Appellant's Counsel,
TROY, N. Y.

SUPREME COURT OF THE UNITED STATES.

No. 257.

THE FIRST NATIONAL BANK OF TROY, APPELLANT,

vs.

MARVELLE W. COOPER, ET AL.

BRIEF FOR APPELLEES.

JAMES S. STEARNS,

Of Counsel for Appellees.

Evening Post Steam Presses, 41 Nassau Street, cor. Liberty. N Y

Supreme Court

OF THE UNITED STATES.

No. 257.

The First National Bank of Troy, Appellant,

vs.

Marvelle W. Cooper et al.

Brief for Appellees.

STATEMENT.

The bill in this case was filed by a creditor of the Troy Woolen Co., to review a decree of the District Court for the Northern District of New York, confirming the report of a referee, and allowing the claim of the appellees. The bill states that the matter was referred to a referee to take the proofs and accounts touching the claim, and to hear and determine the legality and amount of the claim, and report his conclusions. That the referee reported in favor of the appellees; that joint exceptions to his report were filed by the assignee and the appellant; that upon

the hearing of these exceptions the District Court allowed the said debt of the appellees, and that the assignee did not appeal from this decree. To this bill the appellees interposed a demurrer, which was sustained by the court below, and the bill dismissed, and from the decree dismissing the bill this appeal is filed.

I.

The court below decided correctly that they could not review this decree at the instance of a creditor.

(*a.*) Subd. 1 of § 2 of the Bankrupt Act provides that the circuit courts, "*except when special provi-*" *sion is otherwise made*, may, upon bill," &c., "of "any party aggrieved, hear and determine the "case as in a court of equity."

(*b.*) Special provision is otherwise made for this case, for

(*c.*) § 8 provides for a review by appeal, and the only way in which the allowance of a claim can be reviewed is by an appeal by the assignee.

(*d.*) The object of this limitation is apparent. If it did not exist every creditor might take an appeal, and subject the successful claimant to much hardship and expense.

II.

If this were a question of discretion, the equities

would all be against the bill. The courts below have three times investigated the voluminous evidence, and three times emphatically sustained the claim of the appellees, they being compelled to defend themselves at a distance from their home, and necessarily at great expense, both to the estate and to themselves. If each one of the numerous creditors of the bankrupt were to be allowed to carry the resistance of the claim to such an extent, the appellees might better have abandoned it entirely.

See this case *in re* Troy Woolen Co., 6 Bank Reg., 16.

III.

But it is not a matter of discretion. The law has fortunately made ample provision against such a contingency by allowing the assignee *only* to take an appeal.

Bank Law, § 8.

IV.

A court of equity will not intervene to confer upon or restore to a court of law the jurisdiction which it has lost. The appellant and the assignee have had their day in court; a judgment has passed against them and become final, and is now a vested right which no court can disturb. Equity cannot interfere in such a case.

V.

Whatever appellant may claim, this is nothing but a bill of review. No material facts are stated except such as are intended to present the case in this light. The bare allegations of fraud, &c., are mere general charges, amounting to nothing but conclusions, and of no force whatever as a foundation for relief.

VI.

An effort to review a decree and "expunge" a claim in this manner is unique, but hardly even ingenious. It is presented thus: appellees have filed a claim which has been throughly litigated, investigated and sifted (*In re* Troy Woolen Co., 6 Bank Reg., 16); the court, acting through its referee, has sustained the claim; after another long and patient investigation by the District Court, both parties being, as before, heard at length, the court has again sustained the claim; now it is averred, without the statement of a single fact, that the court erred, and that the appellees fraudulently presented and pressed their claim, and therefore it should be reviewed and expunged.

Or, to draw a parallel, a party brings a suit which, after a protracted contest, is finally decided in his favor The time to appeal expires, and the defeated party files his bill to review and "expunge" the claim sued for, merely averring that it is "fraudulent."

The plaintiff had mistaken the principles of equity, which, if so applied, would defeat the effect of "*res adjudicata.*"

VII.

The bill is also defective in not averring facts to establish the existence of the supposed errors of the District Court. It is not sufficient to allege that the court erred, and that appellees had no valid claim. This would afford no material issue, and the court would have nothing to adjudicate upon in the present form of the bill.

Littlefield *vs.* Delaware & Hudson Canal Co., 4 Bank Reg., 77.

VIII.

A demurrer admits nothing but *facts* material to the relief prayed.

The only facts which could be material in this case are such as show that error was committed. There are no such facts averred, but mere conclusions of law, which a demurrer does not admit.

2 Daniell's Ch. Pr., 21 (marg.) and 23.

The allegations from folio 8 to the end of the bill have no relevancy whatever, and are evidently put in merely for effect. There is no pretense that appellees had anything to do with these occurrences. These facts, consequently, are not admitted by the demurrer. The only remaining "fact" which is alleged to be admitted is that appellees have fraudulently proved and made said claim. This is a mere conclusion—no facts are stated, and therefore the demurrer cannot be held to admit it.

IX.

The judgment below should be affirmed.

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